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ABSTRACT

This document reports the proceedings of a 1985 conference on preventing the legal problems that could grow out of the implementation of career ladder and merit pay programs for teachers. The contents of the report include a welcome by Preston C. Kronkosky; an overview by Virginia Koehler of the goals, characteristics, and demands of career ladder and merit pay plans; reviews by state legislators or legislative staffers of the state legislation regarding such plans in Arkansas, Louisiana, Mississippi, New Mexico, Oklahoma, and Texas; and a brief discussion of some of the points covered in the legislative review. The report then presents addresses on "The Teachers' Perspective on Career Ladders and Merit Pay," by Karen Lee Johnson; "The Administrators' View on Career Ladders and Merit Pay," by Joe E. Hairston; "Preventive Law: Its Application to Career Ladder Policies," by William C. Bednar, Jr.; and "Local Education Agency (LEA) Perspectives," by Kelly Frels. Questions and responses raised in discussion among these speakers are presented next. "National Perspective: Liability and Risk for LEAs," an address by G. Ross Smith, completes the report. Among the topics addressed at the conference are planning, the attitudes of those affected, needs for local level commitment, possible conflicts, teacher evaluation, the nature and potential of a preventive law approach, client-lawyer relationships, and legal liability. Appendixes present the conference agenda, biographical data on the presenters, and addresses of conference participants. (PGD)

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PREVENTIVE LAW INSTITUTE ON CAREER LADDERS AND MERIT PAY

The Proceedings

Texas State Bar Law Center
Austin, Texas

August 7, 1985

Prepared by
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FOREWORD

Teacher incentive programs such as career ladders and merit pay plans have been considered or adopted in over thirty states within the past five years. As they plan and act, school districts and state education agencies are anxious to understand the legal as well as the instructional consequences of incentive programs. For that reason, the Regional Planning and Service Project (RPSP) has focused the fourth Preventive Law Institute on issues and problems surrounding merit pay and career ladders.

The ground work for Preventive Law Institutes began in 1980 when the National Institute of Education (NIE) Director Michael Timpane, California State Department of Education Chief Counsel Thomas Griffin, Agnes Toward, and I discussed the need for planning to prevent legal problems. Since then, the goal of the Institutes has been to help educational policy and decision makers apply the concept of preventive law so that state and local educators can act to reduce the probability of litigation. The first Institute was held in Houston, Texas, in 1981 when P.L. 94-142 and state regulation of textbook selections were examined. The second Institute, held in Santa Fe, New Mexico, in 1983, considered the legal complications of using technology in education. In 1984, teacher and administrator evaluation procedures were the focus of the Institute.

I would like to commend Roger A. Labodda, RPSP Policy Specialist, for his work in developing the topic and coordinating the fourth Institute. Thanks are also due to Joe Hairston, chairman of the School Law Section of the Texas State Bar and co-sponsor of the Institute, Patricia Duttweiler, RPSP Policy Specialist, and to Margarita Rivas, Training Technical Assistance Specialist for their assistance in planning, to Barbara Riordan and Nora Rodriguez for technical and logistical support, and to Catherine Clark for preparing these

proceedings. Finally, my appreciation goes to Dick Lallmang, National Institute of Education project monitor, for his support for the concept of preventive law.

Martha L. Smith
Division Director
Educational Information Services

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WELCOME

Dr. Preston C. Kronkosky
Executive Director
Southwest Educational Development Laboratory

It is my pleasure to welcome you to the Preventive Law Institute on Career Ladders and Merit Pay sponsored by the Southwest Educational Development Laboratory and the State Bar of Texas, School Law Section.

The purpose of this Institute is to explore possible legal problems that might arise related to career ladders or merit pay plans. Our objective is to help educators anticipate legal problems so they can take corrective action before policies are adopted and before a suit is filed. Court cases are a waste of valuable educational resources. Lawsuits cost a great deal of money to defend, and even more to lose. Apart from the monetary cost, districts incur political costs from litigation -- it is bad form for superintendents and school boards to spend most of their time in court.

This is the fourth Preventive Law Institute, sponsored by SEDL. The ground work for the Institute began in the summer of 1980 with the recognition of the need for proactive planning for legal problems. The first Institute was held in November 1981, in Houston, Texas, when P.L. 94-142 and state regulation of textbook selections were examined. The second Institute, held in Santa Fe, New Mexico, in April 1983, dealt with the legal complications revolving around the use of technology in education. The third Institute was held here in Austin last February. The legal implications of evaluating teachers and administrators were discussed.

As legislation mandating some form of career ladder or merit pay for teachers and administrators increases, so does the probability of lawsuits by passed-over, disgruntled school district personnel. We are here today to learn what steps might be taken to reduce the danger of such lawsuits.

NATIONAL OVERVIEW: CAREER LADDER AND MERIT PAY PLANS

Dr. Virginia Koehler
College of Education
University of Arizona

Since 1973, over 700 pieces of legislation to promote the improvement of teaching have been introduced. We don't know how these legislated changes will work or how they will affect the lives of students; but we do know that if too many legal actions occur, the usefulness of the legislation is in danger. This fact alone behooves us to look closely at career ladder legislation. To begin with, we know very little about how career ladder and merit pay legislation is implemented and how it works. We have a little bit of research evidence, a growing store of knowledge and experience, and a great deal of speculation about merit pay and career ladder plans.

There is good news in education: The U.S. public -- after years of skepticism -- now believes that teachers <u>are</u> important and do make a difference. Some teachers do better than others, and some teachers can and will improve their reading under the right circumstances. The discouraging news is that people have lost confidence in the capacity of local education systems to attract and keep good teachers. Thus, they rely on State agencies and legislatures to ensure standards for evaluation, and more money for programs and salaries. Many people have come to believe that salaries or other compensation programs are the best way to attract and retain top teachers.

Forms of Differentiated Pay and Rewards for Teachers

There are several types of differentiated pay or incentive systems which have been introduced for teachers. It is useful to recognize these.

- There is merit pay for performance of an individual. Evaluations, usually conducted annually, are the main instrument for determining merit.
- Combat pay is extra pay given to a teacher for work in a difficult situation.
- Career ladders confer honorific titles and provides steps for teachers who are paid on the basis of their rank.
- Differentiated staffing is a way of granting status and duty privileges to some teachers by adding non-instructional duties with or without extra pay.
- Specialist pay is provided for teachers in high demand areas such as mathematics and science.
- Increased time at the job usually results in increased pay.
- Educational incentive pay increases are often given to teachers who earn additional academic credits or advanced degrees.

In addition to monetary compensation, there are other rewards that are allocated differentially based on various criteria: sabbatical leaves, travel to conferences and meetings, days off for planning or curriculum development, promotion to fewer students or brighter students, and access to additional resources. Finally, there are rewards within the power of some principals. Principals can reward certain teachers with assignment to prestigious activities and task forces; they can make timing or scheduling of work more compatible for some teachers; and they can make classroom location more desirable for others.

The Goals of Merit Pay and Career Ladder Plans

Concerns about the politics of merit pay have led many states and local districts to consider, as an alternative, career ladder plans. Most career ladders include a differentiated staffing concept. That is, teachers at different career levels do different things, and many of those are non-instructional activities. The major problem in these career ladder plans is that the job description of the higher-level teacher defeats the

purpose of keeping effective teachers in the classroom. In other words, higher progression on the ladder often removes teachers from full-time classroom activities.

One of the greatest problems with the current rush to establish career ladder programs is a lack of clarity about the goals that these programs have or the problems that they are designed to solve. In many cases, these programs are solutions in search of problems. There are three major purposes being addressed by these programs:

- Upgrading the quality of instruction is an important goal for schools. It is believed that rewarding good teachers and weeding out poor teachers will improve instruction. Better pay is intended to raise the status or prestige of teaching.
- Local districts want to retain effective teachers. There is some evidence that it is the most effective teachers who are leaving the profession faster.
- Schools want to attract higher-quality teachers. Promises of higher pay and higher status through professional development are assumed to attract higher quality incoming teachers.

Existing Merit Pay and Career Ladder Plans

Although these goals or purposes are widely acknowledged, they are empirically unsupported. There is almost no research on the effects of these programs. That which does exist indicates that the competition inherent in merit pay plans may have undesirable side effects. As an example, in-school competition for a limited number of merit pay bonuses can interfere with the collegiality that is necessary within an effective school. Probably the greatest problem that most of these programs face is the lack of instrumentation to measure the quality of teaching with sufficient validity and reliability so that all those involved are satisfied with the fairness of the results. Finally, we know very little about what motivates the current group of classroom teachers and we have no

evidence that dollar rewards in the form of merit pay incentives would attract different or better-qualified individuals to teaching.

How Should Merit Pay and Career Ladder Programs Be Developed?

There is, however, some research on how these programs should be implemented. The main components and necessary steps for successfully introducing a program in a school district include objective assessments, good communications, and widespread commitment.

1. It is critical to conduct an objective self-study at the district level before putting a plan in place. Districts should determine whether teachers are leaving and why. The current evaluation system should be examined very carefully. The Charlotte-Mecklenburg (North Carolina) schools planned for years before they began to implement their successful plan for teacher professional development and instructional improvement.
2. A district needs involvement from the start by all interest groups. This includes teachers, professional organizations, parents, and various levels of the administration.
3. If the plan is to be a statewide effort, there must be complete commitment at the top. Unlike implementing a new curriculum, career ladders touch almost every area of the organization -- including its political framework. Lack of interest or resources at the top turns a career ladder plan into a mess. A career ladder program also needs to be a priority of the local superintendent in order to be a success. He or she can't delegate interest or responsibility for this.
4. Decisions about the plan need to be public and the district must maintain good communications with the public and with the teachers at the building level.

5. Sensitive management is required to implement the program and apply necessary corrections along the way.
6. One of the most important components is an effective personnel evaluation or appraisal system. A good, sound, system will take years to develop.

Some of the Difficulties of Evaluation

Most teacher evaluation systems now in place won't work for career ladder or merit pay purposes. To be useful an evaluation system must be valid and reliable. If it is reliable, all teachers are treated the same. If the evaluation system is valid, it must have both objective validity and subjective validity. Objective validity means that the evaluation instrument really identifies the exceptional teacher. Subjective validity (the more important dimension) means that those in the system believe that the evaluation systems do what they say they will do.

There is a certain tension between the reliability and validity of appraisal systems. Effective teaching involves many skills and may require several measures. There is a limit to how complex an evaluation system can be in order to account for, objectively, all the factors involved. The use of such a standard system should increase the consistency among raters. But principals tend to use a case study approach in which they take into account many factors other than classroom performance. Further, they may weigh the different factors differently depending on the individual. In the process, they may increase the validity of their judgments, but at the cost of lowered reliability.

What States Can Do

State-level decision makers should realize that although merit pay and career ladder programs can be mandated, the ideal level for implementation

is at the local district level. Available research on implementation indicates the great importance that some indigenous factors have on program implementation. Effective plans will look very different from district to district. The State cannot prescribe these. There is also the danger that State-level entities will over-specify program elements because they are thinking about the less effective local districts. In the process of over-regulation and misspecification, many effective districts will find their hands tied because of over-specification at the state level.

When the State wrests control, it adopts a compliance model of implementation in which a complex set of procedures are superimposed and only passive compliance is made at most districts. A better strategy is what is called the "delegated control model" in which the program is conceived and carried out with energy by local district administrators.

Important Questions that Local Districts Should Ask

Before designing a merit pay or career ladder program, local districts should ask themselves which goal, among the three identified above, will they want to address: retaining good teachers, recruiting better teachers, or improving the quality of instruction. These goals may be interrelated. The district may find that its goals or needs do not match the general problems identified by State-level administrators.

Suggestions for States that Do Not Have Legislation for Career Ladders

The following procedures are supported by research and experience. By following these guidelines, a state may be able to mitigate or avoid many of the problems experienced by states which have adopted plans for career ladders or merit pay.

- The State should check carefully the existence of the problem and the location of the problem. If a problem such as retention of top

teachers is evident only for some districts, the State should try to determine why certain districts do not have the problem.

- Once the problems are isolated, the State can study whether a career ladder or merit pay program is likely to address the problems.
- If career ladders or merit pay programs appear promising, set up a limited number of pilot projects. Find out, from the pilots, the costs, the best assessment procedures, the unintendent effects and so forth.
- Develop an incentive system based on what the experience shows is most likely to work.
- The State can encourage a network among superintendents.
- The State can offer staff development programs.

If a State wants to move ahead to put a career ladder program in place, it must get commitment from the leading actors. If the commitment is not there, the idea should be dropped: It is a program that's time hasn't come. When a State continues without this commitment from educational leaders, what will result is a paper exercise or legal actions, or perhaps both.

LEGISLATIVE REVIEW PANEL

THE CURRENT STATUS OF CAREER LADDER/MERIT PAY PLANS

ARKANSAS

Representative Jodie Mahony

In Arkansas, we've put merit pay and career ladders on the shelf at the State level. In our reform legislation of 1983, the merit pay portion of the bill was defeated by pressure from the teacher's association. Even $2 million budgeted for merit pay was considered wasteful and better spent on raising teachers' base salaries. In 1985, a teacher career development ladder pilot project became law. Governor Clinton appointed a commission to begin work planning this ladder, so we are not very far along the road to a full career ladder for teachers.

To be specific, legislation in Arkansas calls for the Governor to appoint a seven-member Teacher Career Development Commission to set guidelines to establish a pilot program in up to six school districts this coming year. The Commission will receive proposals from interested and qualified districts. Teachers and parents are to be involved in the development of district proposals; if less than 30 percent of the teachers in the district indicate an interest in the program, the district does not qualify. The district must also currently pay above-average salaries. Approximately one-half million dollars is set aside each year for the program. After two years, the Commission will make recommendations to the State Board of Education concerning a possible statewide plan.

I feel that we don't have the commitment of all the key actors in this process. Superintendents in Arkansas are overloaded with other reform legislation. Local boards are not involved, and they should be; teachers in Arkansas will not, in my view, support career ladders or merit pay at this time.

If we have career development as part of an overall effort to improve the quality of teachers, we need an evaluation system that is effective and fair. The evaluation system and career development program need to be in concert with the overall reform effort, not separate from it.

Finally, until our base pay is strengthened, we cannot successfully implement a career ladder. Just paying for the new reform legislation was difficult; we would really have a struggle to pay for a statewide career development plan. What we need right now in Arkansas is to raise the base pay of all teachers to attract better new teachers to the schools.

LOUISIANA

Representative Allen Bradley

Louisiana has no clear direction in the areas of career development, merit pay, or career ladders. In 1984, we passed the Act 759 which set up a board to study how a career ladder system would be put into effect. This study report noted that there couldn't be a career ladder program without a uniform method of assessment. It also pointed out that career ladders need to be coordinated with the new assessment system and with the teacher internship program. Our study also agrees with other studies mentioned in specifying that time is needed first to train administrators in using a uniform assessment system. The earliest implementation would be in about three years.

In the 1985 session, the Career Ladder Commission was abolished. HB 1868 of 1985 included a Quality Assurance Assessment Program charged with coming up with a uniform assessment document for 1987. This legislation did not pass because Louisiana would have had to adopt a document that automatically equates to incompetence. What did pass was SB 887. It included a teacher incentive-pay model program. The State Department of Education can invite districts to apply with their own incentive pay plans. The State will fund ten in the first year. After these are in place for one year, the State will select three of those that are successful and fund them for another year. Then, the best plan will be implemented statewide. I believe that statewide plans may encounter implementation problems because Louisiana is so diverse. What works in one district won't necessarily work in another.

Let me touch on some of the legislation we have considered recently which may be of interest to you. The "free agent" bill did not pass but may return in another session. Under this law, teachers could give up lifetime certification and tenure and then be free to negotiate their own salary. Teachers are currently bound by the salary schedule in State statutes. We did pass a "retired teachers bill." A district can bring a retired teacher back into the classroom when a shortage exists. That teacher can teach for at least two years and still collect retirement and they are not bound by the salary schedule. The proposed merit school program did not pass. Under this plan, teachers would receive a pay increase. Teacher and student absentee rates, discipline records, and a district-selected variable would also be used for evaluation.

MISSISSIPPI

Representative Leslie D. King

One thing that is clear is that most of us are struggling with the concept of merit pay in our states.

In my lifetime, the Mississippi legislature has only twice taken an in-depth look at public education.

In 1954, that look was motivated by questions of race and concluded with the passage of a constitutional amendment allowing the legislature, in its discretion, to abolish the State's public primary and secondary schools.

In 1982, we again took an in-depth look at public education. We realized at that point that no society could successfully address the questions of economic development, health care, and the many related human needs unless it first established an effective system of public education.

Out of the study of 1982 came a series of changes collectively designated The Education Reform Act of 1982.

The Education Reform Act of 1982 was predicated on the belief that four items are essential to an effective system of public education. Those things are:

1. Student achievement
2. Preparation and growth of professional personnel
3. Good local management
4. Progressive governance, leadership, and finance at the State level.

Mississippi has mandated the establishment of: (a) standards for admission into teacher education; (b) tougher standards for certification

of teachers and administrators; and (c) continuing education for teachers and administrators.

This continuing education for teachers and administrators takes two forms: (1) a state approved program on inservice staff development in each school district, and (2) a program which rewards financially professional growth.

The Education Reform Act mandated that the State Board of Education on January 5, 1986 recommend to the legislature a personnel appraisal and compensation system.

In 1985, Mississippi experienced its first strike by teachers. The strike was bitter and divisive.

In the midst of this, the legislature, after a lengthy and bitter fight, approved a three step salary increase for teachers.

The legislature mandated that step three, which becomes effective with the FY '88 school year and the future raises would be distributed under the personnel appraisal and compensation plan recommended by the State Board of Education. This implements a system of merit pay.

We in the legislature, recognized that the easy thing is to come up with an idea, the difficult part is to develop and bring to fruition that idea. Therefore, like most policymakers, we placed the burden on the State Department of Education to fully develop and implement the personnel appraisal and compensation plan.

In response to this mandate, the State Board has established a committee to study a personnel appraisal and compensation system. After significant study, the committee has issued its preliminary report, which in summary, is a plan for a plan.

The legislature has mandated a merit pay system, but has not funded that system. I expect to see a fight on funding a merit pay plan.

The term "merit pay" suggests a system of compensation based on subjective value judgments.

Where you find teachers who are not performing their jobs, you will find a principal who has not performed his. Where you find a principal who is not performing his job, you will find a superintendent who has not performed his. Where you find a superintendent not performing his job, you will find a school board which has failed to honor its responsibility to the children, parents, and indeed, the community under its jurisdiction.

One of the more interesting things I have noticed in recent years is the lack of confidence which flows throughout the school system. Teachers don't seem to trust administrators; administrators don't trust school boards, and school boards don't trust teachers or administrators.

Until the problem of internal confidence is resolved, any compensation system predicated on subjective values will be viewed with suspicion and further erode the public education system.

NEW MEXICO

Representative Maurice Hobson

In New Mexico, we're going through some of the same things the other states are encountering in trying to provide incentives to teachers. Networking in New Mexico has been effective. Recognition for excellence brings a real ray of hope and important affirmation. But, New Mexico has not done anything in the area of career ladders or merit pay. We have considered it, but have not adopted legislation.

Our 88 local districts set their own pay schedules. Educators feel safe about the current system and are reluctant to change. Specifically, any pay increase in the form of merit pay is likely to alter the proportion of state revenues going to higher education. There has always been a fight for the share of the revenue pie between elementary/secondary education and higher education, and I believe merit pay proposals would intensify the fight.

Merit pay has been vigorously opposed by teacher associations. They feel that unless you get a good evaluation or measuring system, it won't work. We lack this management capability.

New Mexico has not enacted a school reform program, but we are looking at one. Three committees are currently studying school reform at all levels. The public would like to see improved student performance, but we currently lack the convincing plan to begin a statewide school reform effort.

Here's what we have done so far. In 1977, we adopted a basic skills test. Our students have shown good test score improvement since the early 1970's. We have increased the required credits in science and math for all

students. But there are still factors that slow the school reform efforts. The management of schools is one. A second is that we need to have all actors involved in the process -- superintendents, principals, teachers, and parents. State governing leadership has other interests and teacher organizations are resistant to change. Local boards lack time, energy, and understanding to stimulate and implement school reform. In New Mexico, if we do anything, it will take data for evaluating the current system, a better overall management system for education, and money.

OKLAHOMA

Mr. Bill Thoms, Senate Researcher

Like several other states, Oklahoma rode the curve on oil and gas revenues for several years. Between 1978 and 1982, Oklahoma eliminated many taxes, but in 1983/1984, these revenues ceased to flow in to support appropriations. So we are in the midst of significant fiscal change.

We are conscious of the need for educational reform as well as the need to raise taxes to generate revenue. This year the Legislature raised more new revenue and public education received an increase. This increase helped pay for a $2000 pay increase for teachers, a 20 percent increase for textbooks and resources, and an increase in the minimum starting salary for teachers. The funds were not sufficient, however, for a career ladder in addition to these increases.

The Education Improvement Act of 1985, as introduced, included a Teacher Career Incentive Program. Advancement from professional to senior and master teacher levels would depend on achieving staff development points in the areas of teaching, higher education course work, and performance evaluations. The State Board would adopt standards, evaluation instruments, and criteria for implementation. Local staff and professional development committees would appoint evaluation teams and make recommendations to the State Board concerning the selection of teachers. Local committees would consider student performance and teacher communication skills. Input from the applicant's peers would also be included at the master level. As I said, this part of the Legislation did not pass, but proponents for the career ladder are still active in the House.

I think our direction now will be to look at State funding incentives for local, district-developed programs. The State Education Agency is implementing legislatively - mandated statewide criteria for annual evaluation of teachers. This year training of evaluators is being addressed. If we get evaluation under control, one of the main obstacles to the career ladder will be overcome. But I believe there is substantial room for local initiative to improve the professional development of teachers.

In Oklahoma, we have five years' experience with our entry-year testing program, teaching inservice, and staff development requirements. This year the legislature has called for a review of these. Results of this study may also move us further along toward a career ladder.

TEXAS

Representative Bill Haley

To understand what is going on in Texas, we need a perspective. In the late 1970's, we had a "back-to-basics" concern. Then, in 1981, HB 246 referred to as the "Reform Bill" passed. It revised many curriculum requirements and dropped others. The bill listed twelve subject areas that must be addressed in the schools. The Texas Education Agency, with the districts, was charged with developing the actual curriculum.

In 1984, A Nation at Risk excited the public. The classroom teacher, not the curriculum, was identified as the culprit. What came from A Nation at Risk which is positive is the teachers' own recognition of how they are seen by the public. They also had a chance to seize some control of the situation. But, in Texas, oil revenues dropped and the school finance bill was not passed. Texans, perhaps stimulated by reports from the Perot-led Commission, came to believe that teachers were simply incompetent and ignored the fact that teachers weren't paid well or given professional development opportunities that the business community, for example, has come to expect for professionals.

In 1984, Texas passed HB 72, a large effort which may have gone overboard in some areas. Testing is an example of this. The idea of testing teachers to determine literacy and minimal competency has public support, but I am not sure what it is supposed to accomplish. We may simply come up with litigation.

Texas is currently moving to implement its four-level career ladder. Experienced teachers qualified for Level 1 in 1984. By the end of the 1984/85 school year, many teachers were eligible to move to Level 2

following evaluations conducted by the school districts using local evaluation procedures. The Texas Education Agency is developing a statewide evaluation system for the plan to be used beginning in 1986. The Agency will train over ten thousand evaluators to conduct the evaluations. Our hope is that all teachers will be Level 4 teachers or working their way to that level. The goal is to have all excellent teachers. The requirements are spelled out in the law so that districts and teachers know what they have to do. The law also provides room for local flexibility so that districts can tailor what they do to meet local needs.

Teachers in Texas are becoming afraid of HB 72 and the career ladder, however. Why? Primarily because the ladder was underfunded and in some districts all eligible teachers cannot be placed at Level 2. In some districts, teachers move up the ladder according to chance, in other districts, they move up based on factors unrelated to professional accomplishment.

One thing the reform bills have done for Texas is to spotlight education. They have also brought new opportunities, and I am optimistic about this. Teachers in Texas have come to realize that they are public employees, and the Legislature is trying to improve opportunities for these public professionals. We have lowered the maximum class size, we have instituted a duty-free lunch for teachers, and we have emphasized instruction. The spirit of our reform legislation (HB 72) can be summed up in this sentence from the legislation.

> The rules shall, to the extent possible, preserve the school day for academic activities without interruption for extracurricular activities.

Classroom instruction must be free from distractions and interruptions if it is to be effective.

Q: Isn't the testing of employees out of hand? For example, we have seven or more tests for people in education in Texas.

A: The public is demanding it. They know that administrators in schools aren't evaluating properly, so they turn to testing for accountability and are willing to accept those results instead. But testing classroom teachers is not a real substitute for proper evaluation. Hiring and firing based on test results will present legal problems for states with tenure laws.

Q: Are school administrators in the testing program in Texas?

A: Yes, they are. Preston Kronkosky pointed out the concern of some of the public for the lack of educational leadership. He encouraged participants to read Robert Reich's The Next American Frontier which describes the demise of American leadership and provides a plan for reasserting that leadership. The bottom line is investment in public education.

Q: Colleges are telling us that Texas teachers are flocking back to academic training. Is this true?

A: Yes, it is true. We are assuming that the children will be reaping the benefits of these efforts.

Q: When you entice retired teachers to return to teach for two years, do they participate in social security?

A: Not in Louisiana--teachers are excluded from social security. This bill has not yet taken effect, so we are not aware of all the problems which it may cause.

THE TEACHERS' PERSPECTIVE ON CAREER LADDERS AND MERIT PAY

Karen Lee Johnson
General Counsel

Director of Teacher Rights
Texas State Teachers Association

My responsibility with the Texas State Teachers Association (TSTA) is to work with problems that are arising from the career ladder. TSTA did not support HB 72, in part because of the career ladder and because it was underfunded, but it did not actively oppose it either.

Before I touch on the concerns of teachers over the career ladder, let me provide some history behind the career ladder in Texas. The Select Committee on Public Education (chaired by businessman Ross Perot) said that the current salary schedule should be replaced with an evaluation-based career ladder to ensure that teachers get the respect and financial rewards that they deserve. The Committee recommended four levels with criteria for advancement to be based on a (not yet developed) comprehensive and fair evaluation and a transcript of advanced course work. The Committee also recommended that starting salaries should be sufficient to attract outstanding teachers and have incentives to keep good teachers. Performance evaluation was to be made by a trained team, and teachers were to be consulted extensively. Some of the spirit of the Committee's recommendations was made into law.

Now, let me provide a teacher's view of what has really happened. We have a career ladder system in Texas where teachers are placed on the ladder based on past behavior or assessment from a time when there was no

statewide process. In other words, placement on the ladder has been made without proper evaluation. According to some State education leaders, it will take four years to get an appraisal system in place across the State. In some districts, there is chaos rather than orderly implementation. For example, appraisals of teachers must be detailed by categories. A conference with administrators and/or appraisers is required and the requirements for advancement must be spelled out to teachers. But, in fact, teachers who are asking administrators how to get on the ladder or up the ladder are hearing that administrators "don't know" or won't commit themselves to helping them get to the next level. The teachers have been told that evaluations are not grievable. We have, as a result, a lot of teacher frustration.

This teacher frustration is not surprising in view of the fact that the State Board has changed their rules for career ladders three times. Hence, 1,100 school districts were putting teachers on ladders during a time when the rules were changing. This has resulted in considerable inequity.

Another major source of frustration is that the career ladder isn't available for everyone who is qualified to get on it. There is not enough money in some districts, so stricter performance criteria have been instituted to limit entry or movement on the ladder. Further, the State Board approved these district-level cirteria without checking for job-relatedness.

While the TSTA is not filing suit against the career ladder portion of the legislation, I am not aware of any law in Texas in the last twelve years that has resulted in so many appeals. TSTA has prepared over 220 teacher appeals on the career ladder and this does not count the local-level appeals.

What problems are surfacing in these appeals? Here is a partial list.

- The within-district residency requirements can be a hardship on individuals who have to move for family reasons.

- Because of underfunding, some districts have instituted quotas such as only two outstanding teachers per building or no special education teachers on the ladders.

- There is no evaluation system for Texas. Those which were used were not appropriate, point systems were adjusted to fit the changing rules, narratives were changed to checklists and so forth.

- Committee evaluations were not uniform and many committees met (after not before) ladder designation was made.

- Eligibility criteria were unfair. Some districts had wait lists and some districts didn't recognize degrees and hours of education earned before the ladder.

- Attendance criteria produced individual hardship. No recognition was made for the reason for absence. Teachers shouldn't be evaluated as professionals on the basis of absence due, for example, to a serious car accident.

- Committee composition isn't always clear. Is a principal, who is also a teacher acting as a principal, on the committee?

- Decisions in some districts were made behind closed doors. Teachers didn't know the criteria for selection. How teachers feel about being on the career ladder is more important than the money involved.

Here is advice that the Texas State Teachers Association would offer to State leaders who are considering career ladders:

- If you have a career ladder plan, don't let it substitute for good base pay.

- Don't remove master teachers or top-level teachers from the classroom. The rewards for good teaching should not be less than teaching.

- Make administrators aware of their roles and give them training.

- A career ladder plan should be implemented with the help and consultation of teachers.

- Make sure the process is free from capricious and arbitrary selections.

- Get all the actors involved and committed.

- Make sure the program can be funded for all who are eligible.
- A career ladder will not remove incompetent teachers. A good evaluation system may do this, but not a career ladder.
- Career ladders or merit pay won't attract good individuals to the profession by themselves.
- If you do decide to enact a career ladder, provide time for it to be properly implemented.

THE ADMINISTRATORS' VIEW ON CAREER LADDERS AND MERIT PAY

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Let me provide management's view of the Texas career ladder program. I defend school boards across Texas and I get a general feeling for what they think about career ladders. Management views these programs as a mixed blessing. They like merit to be a part of an evaluation program, but the current legislation has created a nest of problems for them. Some of those problems are the appeals which the teachers' association, TSTA, is about to file.

The Texas Legislature "set up" the local districts. There wasn't enough money so that all teachers who met the Level 2 criteria could get on the ladder. Districts are permitted to cut the stipend that goes with tne ladder to $1,500, or they can make stricter standards for performance. Districts have done both. The system is, therefore, a form of merit pay, not a career ladder.

What happens when a teacher feels the career ladder process has been unfair? The teacher can appeal, and the appeal first goes to the committee that performed the evaluation. The local board must then have a hearing on the appeal. In Texas, the local district decision in the matter is final except when arbitrary, capricious or made in bad faith (this covers just about everything). If these conditions are present, appeal can be made to the State.

We already know some things about the legal implications of career

ladders. First, career ladder assignment is not a property right. Tenure is a property right and can't be withdrawn without due process and good cause (Kanter vs. Community Consolidated School District). The same case argued a liberty interest. Denial of the merit increase, said the teacher, deprived her of status and reputation - hence, liberty. The court did not uphold her argument.

It is likely that a suit alleging a property interest in the career ladder will be filed in Texas. The court will probably not uphold the argument that a teacher has a property interest in placement on the career ladder. A teacher can, however, allege that the free speech right has been violated in the career ladder selection process. Anything that arguably looks like retaliation against a teacher can be litigated under free speech.

Reductions in force (RIF) on the basis of evaluations (or merit) will result in litigation. We have a case like this in the court right now. This case, involving alleged retaliation for protected conduct, has been filed by several teachers who have alleged that they were let go due to their TSTA affiliation. This case has not been decided yet.

The bottom line for state policy makers is that the price of weeding people out based on merit (and that includes using career ladders to select teachers for pay increases) is a very high price. My personal experience with merit pay at the university level is that it also engenders collegial conflict that can be destructive. The state should avoid setting up an adversarial process and environment, or the lawyers will be the only "winners" in the process.

PREVENTIVE LAW: ITS APPLICATION TO CAREER LADDER POLICIES

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Let me state at the outset that preventive law is a field in which very little effort is required to become an "expert" if by that term one means mere familiarity with the existing research and literature. This is so becuase there is not an extensive literature on the subject. For much of what is to come, I am indebted to Professors Louis M. Brown and Edward A. Dauer who have co-authored the leading articles and books in this field. In the realm of preventive law policymaking, I have also drawn from Merle McClung's article entitled Preventive Law and Public Education: A Proposal, published in 1981 in the Journal of Law and Education.

Preventive law has not reached the level of sophistication in the school law practice that it has in areas of the law that have lended themselves more readily to transactional planning, such as business and commercial law, wills and estates, property and trusts, and state and federal taxation. This may be because the school practice is thought to be a relatively new area in which settled legal rules have not yet emerged, although I personally think that it is an old-fashioned idea. Rules of law are employed in the planning process in order to know, with a given purpose in mind, what facts must be created in the future to yield legal results necessary to or consistent with that purpose. There is nothing new about that idea. As Justice Holmes said in 1897:

> "The reason why [law] is a profession, why people will pay lawyers to argue for them or advise them, is that in societies like ours the command of the public force is intrusted to the judges in certan cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run for the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."

To which, in these modern times, we would also add "through the instrumentality of administrative agencies."

This process is less precise, and therefore less fruitful, where the legal rules themselves are unsettled, as in the case, for example, of career ladder systems. It would nevertheless appear that preventive law concepts would have great and immediate utility in many areas of the school practice, even in the case of the career ladder, if only we would pause, think, and utilize them.

The thought of pausing and thinking, however, suggests another reason why preventive law has not received more emphasis in school settings. Most school systems are public agencies whose limited fiscal and legal resources have tended by design or by default to be absorbed by crises, such as litigation, administrative hearings, federal compliance reviews, and telephone calls from anxious administrators with on-site problems. Preventive legal analysis takes time and thought; in many cases too much time and thought for budgets, already strained by the myriad good programs and causes, compete for our educational resources. But, perhaps the time has come to pause and think through what advantages can be gained in allocating some portion of our resources specifically to a preventive law program.

Consider first the question of cost. It is fairly obvious in most situations that it costs less to avoid trouble than it does to get out of trouble. As a matter of direct cost, which is that of simply setting things right, it is plainly less expensive, for example, to pay for a survey and abstract of title than it is to deal with a new school building built three feet over a utility easement. There are also less obvious, indirect costs. Correcting errors nearly always consume time, disrupts plans, and frays tempers. All too often, it also destroys valuable relationships and diminishes the quality of education. These are factors which are less capable of precise circulation, but whose detrimental impact on the schools may be far greater than the direct costs.

This is not to say that prevention of legal trouble is without its own costs. But, the difference between the cost of prevention and the cost of cure is that in most situations and with reasonable accuracy, the cost of preventing legal problems can be estimated ahead of time, whereas the cost of cure cannot. Without preventive legal advice, one may not even realize that a legal problem exists. But even with a grasp of the problem, one cannot easily predict the form in which the problem will be presented or when it will arise. Will it be when TEA arrives for an accreditation review or monitoring visit or when an impoverished teacher files a private lawsuit? Will any of these things occur soon? A year from now? Two or three years?

Control of costs is not the only advantage of preventive legal planning. Being named a defendant in a lawsuit is always one of the risks we run, but preventive legal planning tends to decrease the likelihood of a lawsuit and gives better assurance of good defense. We can through foresight often predict legal risks and minimize their scope, and, even in

those areas where the law is less certain, such as the new career ladder statutes, we can at least evaluate the risks and choose courses of action that are less risky than others.

There are several helpful distinctions to be drawn between preventive law and the curative approach of lawyers and clients faced with resolving a dispute or a problem that has already occurred. Indeed, it is the chronological element that provides the most universally distinguishing characteristic between a preventive law problem and a curative law problem. Legal advocacy tends to focus upon things that have already happened - to correct an undesirable problem that has already occurred. Preventive lawyering is concerned with things that might happen in the future and it is useful to structure the future in some desired and optimal way. Another distinction is in the allocation of decisionmaking between lawyer and client. In litigation, the client is generally regarded as the one who determines the goals while the lawyer decides upon the means of achieving them. In the preventive practice, objectives and means may be indistinguishable, and the decisionmaking aspects of the lawyer-client relationship more complex.

The client's objectives more often should be seen as ways of achieving more basic underlying purposes, and less often should be taken at face value by the lawyer. When the administrator asks, "How do I deny a level 2 raise to this teacher?" the question can be seen not as a question but as but one solution to an underlying purpose, which may be to penalize the teacher for a job poorly done. But, even this formulation of the objective may be seen as only one of several solutions to yet another purpose even more deeply seated -- to obtain competent teaching performance. Does the teacher have easily identifiable and correctible shortcomings? What

measures can the teacher take to correct deficiencies and improve his or her performance evaluation? On the other hand, is the real problem that the teacher should be nonrenewed or dismissed? Can a resignation be obtained? Would either be cheaper and better in the long run than postponing the inevitable by merely denying a raise?

The point is that, in the preventive practice the lawyer is called upon to be sensitive to the total personal or institutional context in which the client is raising the problem and to the basic motivations that may be involved.

Moreover, in the preventive practice, lawyer and client are usually faced with a mixed array of legal and extralegal judgments. Whether a given set of facts presented in a particular type of lawsuit will yield a win or loss at the courthouse is a matter of legal prediction, which lies principally in the domain of the lawyer's judgment. But, whether the particular transaction or relationship being fashioned by policy, contract, and conduct in the operation of a school will satisfy the many institutional and personal objectives of the players requires not only predictions of law, but also predictions of fact, which need to be clearly identified as such and explicitly allocated between lawyer and client during the process of consultation.

Yet another distinction between litigation and the preventive practice is the extent and variety of choices, which are far broader in the preventive realm. Once an event has happened, the law applicable to it is more or less certain. But the preventive practice focuses on planning, which is in a sense creating facts that will exist in the future. If we are not satisfied with the legal result that would flow from one set of facts, we may be free within surprisingly broad limits to draft our board policies, our

school rules, our administrative directives, and our contracts, or to make antecedent decisions regarding teacher pay, or student discipline, library books, religious holidays, and the other myriad things entailed in running a school system, in such a way as to yield an entirely different set of facts when a point of legal dispute is eventually reached.

From the lawyer's point of view, the preventive law technique will be to perform with one important difference, essentially the same task of legal analysis as would be performed in a curative situation, which is to discover what substantive legal rules bear on the client's purpose, i.e. what facts will, under the law, yield what results? The important difference is that the facts have not yet happened, and the task is to create, in the present, those facts in the future that will produce legal results consistent with the outcome desired by the client. The lawyer accomplishes this by creating institutional and transactional structures, drafting documents, and influencing client behavior, according to a plan devised in corporation with the client and measured and revised against the client's capabilities and other interests. The entire matter is thought through from beginning to end, considering what events might possibly affect the ultimate purpose, and the plan is accommodated to these possibilities so as to leave the purpose unimpaired. Consideration is also given to future stages of the client's own conduct once the immediate purpose is accomplished, and provision is made, to the extent possible or foreseeable, for the contingencies that may be presented. Then the plan is reviewed for effectiveness as it unfolds, either when predetermined decision points arrive or when unforeseen events occur.

But educational insitutions are, in the great majority of instances, also state or local governmental bodies, and much of their collective and

individual conduct results from the implementation of policies and rules. Here, too, there are opportunities to save much trouble and grief through preventive legal planning.

School policies, of course, have profound impact upon practically every aspect of a school's educational functioning. They constitute the organic law of the institution, and touch upon practically every area in which legal challenge or litigation is likely. A strong preventive law approach to policymaking therefore does much to create the future factual framework in which legal disputes will arise and be resolved, whether the subject be employment relations, student discipline, racial discrimination, handicapped children, testing and evaluation, or even the levy and collection of school taxes.

Certainly it is wise, for the reasons we have already discussed, for education programs, including career ladder plans, initiated at the school district level to be subjected to preventive legal analysis before school board policies are finally formulated and placed into operation. There are at least four good reasons for doing so.

First, unlike the more discretionary days of yesteryear, statutes and judicial decisions, both state and federal, now erect a complex legal framework within which local school bodies and administrators must carry out their educational duties. More often than not, there are specific legal rules with which school board policies must comply. For example, new Section 3.302(c) of the Texas Education Code says that a classroom teacher may not appraise a teacher employed at the same school campus "unless it is impractical because of the number of campuses." What does that mean? The opposite of what it says?

Second, local school board policies and their implementation more often become subject to hostile legal scrutiny. At both state and national levels, there are now networks of advocacy groups, legal services attorneys, public sector trade unions, and other associations and interest groups who are actively concerned about the legal rights of students, parents, teachers, and employees. Even now, the first wave of career ladder appeals is washing through the Texas Education Agency, in most instances with the support of teacher advocacy groups.

Third, preventive legal review serves the salutary goal of minimizing a district's infringement of the law.

And fourth, preventive legal review of school board policies may go far toward preventing the time, expense, inconvenience, polarization, and loss of control that invariably accompany litigation.

Given that there are good reasons for a preventive law approach to administrative policymaking, what are the elements of preventive legal review? The first step, identification of legal risks, is one that may or may not involve the lawyer. The objective is to determine whether the proposed policy, or the program it is intended to further, is likely to cause injury, and if so, to whom, and in what manner. Is there some likelihood of bodily harm? Damage to educational, economic, or social interests? Disparate impact among protected minority groups?

If this sort of anticipation disclosed that a policy or program may carry some legal risks, the next step is to evaluate the legal issues. Involvement of the school attorney is now mandatory, because the tasks are to perform the necessary research and analysis and formulate legal opinions, which call for the professional judgment of an attorney.

Once the legal risks have been evaluated, both lawyer and administrator should return to the proposed policy and analyze it to clarify, to the extent possible, the line between legal requirements and policy options. There will be certain policy issues that will be definitely foreclosed by legal requirements, while others may be relatively free of legal constraints. There will probably be a large number of policy issues falling somewhere in between where careful drafting may promote standards of fair play and avoid potential legal challenges. At this stage, the most searching analysis should be made of the institutional client's legitimate purposes and objectives. Preventive legal analysis will be of little value where the client is developing a policy purely for political or other advantage, with foreknowledge of its illegality, or is adhering to a policy that has already been unlawful. If the real objective is to let the courts take the political heat that may ensue from an unpopular policy change, then the client is not faced with a preventive law problem, but with a curative law problem, and the legal considerations are quite different. Preventive legal analysis is of most value in developing policies and procedures to better achieve the educational objectives of the school district and at the same time recognize and accommodate the legitimate interests of the persons affected by the policy.

Finally, upon completion of this analysis, it may be necessary to modify the proposed policy by reason of legal vulnerability or related policy considerations. The role of the lawyer at this stage is to ensure that the modifications made are consistent with the underlying legal rationale upon which the policy has been analyzed.

How would this sort of process be of value in dealing with the career ladder statutes? Well, I have just two things to say about the 1984-85

transitional provisions in Texas. First, we all would have benefited if the Texas Legislature had employed some sort of preventive analysis before deciding to set local communities adrift without adequate funds or uniform, objective standards. Second, implementation of those provisions is no longer a preventive problem, but a curative one. In most instances, the 1984-85 decisions have already been made.

With regard to the future, the most fruitful area for preventive law planning is unquestionably the appraisal process. The State Board of Education is to prescribe an appraisal process and performance criteria, but I would urge all school systems, with the aid of their lawyers, to regard those rules only as a starting point for the development of local appraisal policy. At least at the administrative level, career ladder decisions will stand or fall with the appraisals upon which they are based. From the constitutional standpoint, one might ask whether the Legislature has done anything new at all. Since 1949, the Legislature has prescribed standards for teacher compensation, local supplements, etc.

However, if preventive legal analysis in policymaking is to be more than an empty ritual there needs to be mutual understanding of the dynamics of the lawyer-client relationship. Educational insitutions are composed of people who are or may be the clients of lawyers, and nothing is more essential to the success of a preventive law program than candid, complete, and timely communication between lawyer and client.

For the lawyer, this means re-examining some old assumptions. Every young lawyer learns, or thinks he or she learns, early in the practice of law that clients do not hire lawyers to tell them they are wrong or misguided. Everybody knows that clients pay lawyers not only to tell them they are right, but to prove they are right. This is a difficult feeling

to dislodge, particularly when so many clients regularly reinforce it. But, dislodge it we must if we as lawyers are to serve those school administrators and other clients who come to us not with lawsuits, hearings, and other crises, but with purposes, objectives, and plans. We will have to be more scholarly in our research, more careful and deliberate in our legal reasoning, more circumspect in our view of the client's operational setting and motivations, and more willing to venture into the realm of extralegal decisionmaking.

For clients, good communication may call for a reassessment of the way in which lawyers are viewed. There are at least two ways of looking at lawyers that will do much to wreck a preventive law program before it gets started.

The first is to think of the lawyer as a technician or consultant from whom an "opinion" is sought. Clients who take this approach frequently provide only the facts that seem important to them, and all too often the concern is simply to bolster with a lawyer's opinion a course of action already decided upon or a position already taken. For some clients, one lawyer isn't enough, and they will call four or five for a sampling of opinion on their problem. In some instances, the client may choose not to be a client at all, and seek advice from a lawyer from the state educational agency or school board association who not only does not (in the case of the state agency cannot) stand in an attorney-client relationship to the caller. Unless the relationship is a continuing one with considerable contextual knowledge on the part of both lawyer and client, those "quickie" opinions over the telephone are usually worth less than the pittance usually paid for them.

Another unfortunate consequence of viewing the lawyer as a technician is the tendency to bifurcate a problem into "the educational part" and "the legal part," as if the one can be accomplished independently of the other. This leads to poor communication about pruposes and objectives and a limited view of alternatives.

The other view of lawyers that seems to prevail in some quarters of the educational community is that of the "miracle worker." For these clients the law is a delphic mystery, to be invoked with incantations and magic. All one needs is a blind faith in one's chosen lawyer, who will surely find a way to vindicate the client's interests. The tendency here, of course is not to call the lawyer until it is too late. By then, the benefits of preventive law planning are lost.

A good preventive law approach instead calls for involving the lawyer regularly in the operations of the school district. Choose a lawyer carefully, give the relationship time to develop, and don't wait until the citation arrives to do it. Be less immediately concerned with actions and positions, and more deliberately concerned with basic purposes and objectives. Understand, when the lawyer probes motives, bares secrets, and exposes weaknesses, that it is far better to suffer such indignities at the hands of one's own lawyer in the privacy of the office than at the hands of someone else's lawyer in the public glare of the witness stand. Preserve the important distinction that it is the lawyer's function to advise of alternatives and probable consequences, but it is the client's function to decide on the course of action. Recognize that the closer lawyer and client can come to grips with basic purposes, the more numerous the planning options will be, and the more likely a legally defensible and cost-effective plan of action will emerge. And realize the truth of the

familiar oil filter commercial on TV: "You can pay us now, or you can pay us later."

I would urge each of you to give some thought to what value preventive legal planning might have for your school systems. Most of you would think nothing of paying between $20,000 and $30,000 to an assistant principal to obtain the benefits of the school system that flow from the services of that individual. Are the benefits of preventive legal planning any less valuable or important? Those of you who have endured the travail of major litigation will have no difficulty answering that question. Those of you who have not, I would urge to learn the easy way that an ounce of prevention is worth a pound of cure. Any school district in this day and age which does not have a regular counseling relationship with competent school legal counsel is courting disaster. The concept of preventive legal planning offers many opportunities to improve on that relationship to the great benefit of the school system, and can do much toward freeing trustees, administrators, and teachers to go forward with their higher and greater calling, which is to educate our young people. Thank you for the opportunity to speak today, and I would be glad to respond to questions at the appropriate time.

LOCAL EDUCATION AGENCY PERSPECTIVES

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Bracewell & Patterson

As an attorney, I represent school boards. School boards might say that the negative issues raised about career ladders may be proof that we really need them. My experience also leads me to believe that there is a delicate balance to be maintained between legislative and local initiative in developing ways to improve instruction.

There are a few districts that began, before the career ladder, to identify and reward teachers for above average performance. Houston is one example, Dallas is another. The Houston Independent School District rewarded teachers on the basis of several criteria: assignment in critical locations, attendance, performance of students (based on previous performance), and assessment ratings. The critical part of this process was the assessment of teachers. I believe that this will be true of any successful career ladder program.

Educational institutions have policies and rules which need to be subjected to preventive law analysis before implementation. There are at least four reasons for this. The first is that some rules are not clear within the complex legal framework of state and federal laws. Second, local policies are more likely to be subjected to litigation and to require close analysis. The third reason for preventive law analysis is to minimize the district's infringement of the law before it implements it. The fourth reason is that time, money, and control can be lost through litigation.

What are the elements of preventive law review? I believe there are four major elements: identifying the legal risks; evaluating the legal

issues using competent counsel; analyzing the proposed policy to reduce the risk of legal challenge; and modification of proposed policies to minimize risk. If a district's real objective is to let courts decide on an issue that is complex, then preventive law is not needed. But it is my experience that this is seldom the district's goal.

In Texas, it is the teacher appraisal process that requires preventive law analysis. The legislation is only a starting point for districts. In Texas, districts supplement state salaries and include their own standards in appraisals. Constitutionally speaking, the new law in Texas may not have changed things. Career ladders are a legitimate State authority and probably constitutional on the face. But local district implementation can be subject to litigation depending on how the program is modified and how it is put into effect.

Lawyers for school districts may need to examine some assumptions very carefully. For example, clients generally hire lawyers to tell them that they are right and to prove it in court. Preventive law attorneys need to dissuade local districts as well as teacher clients from some kinds of litigation. Second, if lawyers are seen as consultants from whom opinions are sought, clients will provide only facts to reinforce what they want to learn in a given situation. A better idea is to develop a long and continuing relationship and reduce the number of quick opinions.

The assessment system is a likely area from which plaintiffs may attempt to use to establish a district's legal liability. Prior to the career ladder, we used assessment to try to weed out incompetent teachers. The assessment must now serve broader purposes and serve as an instrument to reward teachers, not to terminate or discipline them.

An effective assessment document or system has these characteristics.

1. It has a purpose (e.g., to improve teacher performance).
2. It states who will be assessed and how often.
3. It states who will do the assessing and what roles (if any) the assessors have in the school system.
4. It defines which areas are to be assessed. This will depend on the goals and purposes. In Texas, assessment must be related to classroom instruction, but a local district may also be interested in broader goals such as collegiality, leadership, and extra-curricular activities for non-career ladder uses.
5. If the system is statewide, you will need a statewide assessment document to ensure consistency. The State should not, however, confine the districts to a single instrument for all its needs. There must be room for local district additions to meet local needs.
6. It has a clear rating system understood by everyone for use in evaluation.

In implementing an assessment system, the State must have input from those to be assessed. The teachers in schools, college of education instructors, and even the associations should be consulted. We have found that teachers who are involved in assessment take that job very seriously. It is also critical to train assessors. In addition to training for assessors, the State or the districts should provide inservice training for the people who will be assessed. Teachers need to know how they will be evaluated and to what use the evaluations will be put. Classroom visitation policies should be clear and the conference between the assessor(s) and the teacher should be given adequate time. Finally, the dissatisfied

teacher needs an avenue for advice and hearings if the process is not perceived to be satisfactory. This process need not be and probably should not include, the district's formal grievance process.

I see at least eight problems in implementing career ladder programs.

1. In Texas, the career ladder came too fast. There should have been a phase-in procedure and period.
2. The evaluation system must match the law that is enacted. The system should be in place when the law is implemented.
3. Adequate funding must be provided; without it teacher morale will be lowered and inadequate selection procedures increase the chances for disenchantment and the resulting lawsuits.
4. Inconsistent rules and leadership from the State Education Agency will cause problems.
5. Ineffective communication at all levels, state and local, will hinder the process.
6. The requirement for advanced training must be very clear.
7. Wide variations between past and present evaluations and between individuals on the subject of what constitutes good teaching will lead to problems.
8. Ranking systems irritates teachers and lead to problems for districts.

The experience of Texas has brought not only problems but many benefits to Texas. The new ladder has rewarded a lot of teachers on the basis of classroom performance. Many teachers are going back to college to get advanced training that they probably would not have undertaken without the ladder. Teachers are getting more involved in their profession and this will have wide benefits. In Texas there has been a serious attempt to

assess all classroom teachers for the first time. The emphasis on instruction seems to be a good thing; we cannot tell yet if measurable student improvement will result, but the perception that "something is being done" is good.

Texas, as well as other states, has future needs in the area of teacher career development. These can be listed briefly.

1. States need to watch that they do not take all the control away from the local school district. District flexibility must be maintained because there are local needs.
2. Fund statewide systems on a statewide basis. Do not leave it up to local districts to make up the slack.
3. Local districts should not be foreclosed from starting other career development or ladder programs (for nurses or librarians, for example).
4. Preventive legal analysis on the confidentiality problem is needed. States need to be clear about who has access to teacher evaluations. If these are computerized, the security problems are probably greater.
5. The Legislature should stay with policy and let procedures be developed at the State agency or local level.
6. Have a phase-in period of moderate length for career ladders.
7. Develop the assessment policy in advance of implementation. Try not to have only one evaluation form for the whole state which cannot be amended by districts.
8. Do not wait too long to get the career ladder plan in place. Those who are resistant to change will form an effective block to the plan if you wait too long.

Q: You mentioned concern with confidentiality of teacher evaluations. What about teachers who serve on evaluation committees: isn't that part of the same problem?

A: It is not a problem if committees are appointed by the local board to do the evaluation. Nothing in law restricts the use of evaluation. Districts use the same standards that are in place for student records. One needs a legitimate educational interest in the records in order to have access to them. Educators must know the public records law in their states or have access to counsel who does. Certain employee records are typically closed for protection against invasion of privacy. Home phone, pay and medical records, for example, are protected. The public may have an interest in teacher performance, however, and this may not be protected under state provisions for privacy.

Q: Why are counselors omitted from the Texas career ladder. How can these people be rewarded?

A: The Legislature determined that the point was to improve classroom instruction, therefore vocational educators, librarians, nurses, administrators, and counselors (those who do not teach 4 or more hours) are excluded. District additions to the ladder provisions can include these classifications, however. These locally-based ladders won't transfer from district to district however. There may be an unstated assumption that librarians, nurses, and so forth don't have a direct impact on instruction. Whatever the assumption, those professionals weren't happy about their exclusion from the ladder. Perhaps they will take legal action.

Q: Were special education teachers included in the Texas career ladder?

A: They were excluded from the State law but some districts have included them. There has been wide variation among local districts in the implementation of HB 72 career ladders.

Q: Can a teacher not participate or decide not to move up?

A: In Texas, the answer is "yes." Some teachers are not participating voluntarily. Texas still has a chance to implement a true career ladder but the current plan is much like merit pay because the dollars flow according to merit, not to job responsibilities. Under a true career ladder, a teacher could, with dignity, choose not to move up on the ladder.

Q: Can one evaluation system really support the whole state system?

A: Yes, it can, so long as local additions are permitted. Evaluations from a statewide, uniform system can be transferred across districts. That is the advantage of the uniform system.

Q: The purpose of merit pay or career ladders ought to be to get the best teachers into the classroom. I've heard it said that this will happen, but I can't see how a career ladder will really bring the best teachers.

A: Teachers earn degrees, put in years of service, and show some performance. The first two will help us get good teachers, but the performance evaluation is causing the problems. We need a reliable evaluation of what is good teaching. Also, the career ladder should be above a respectable base and based on an objective system. Entering salaries should be competitive.

Q: Merit pay may result in only a 40¢ an hour pay increase. Who would want their child taught by someone who is motivated by 40¢ an hour?

A: We can talk about economic incentives up to a point. But a career ladder plan can consider factors other than money which are important to teachers. The first goal is adequate and fair teacher compensation. Then more money and other incentives will have more meaning.

Q: Does anyone use student outcomes for merit pay?

A: It is an aspect of some local plans in Texas. Dallas uses student outcomes for merit school programs. There is so much opposition among educators that test scores are not very often used. Growth in test scores may be a better measure.

Q: Effective schools research suggests that principals are the key to effective schools. Is there any interest in putting principals on levels of a ladder?

A: One district in Texas uses a plan where principals are paid based on workload and student performance. This is a form of performance pay for principals. One state has an instrument to do this which they will try out next year.

Q: I haven't heard the word "supervision." I see a distinction between supervision and evaluation. Evaluation becomes summative when people are under correct supervision so they can grow and change. With most evaluations we only train people to be clever to get good evaluations.

A: Ten years ago we emphasized being nice to teachers and using positive reinforcement. This failed because there were no standards and no

consequences for not meeting unstated standards. Supervision is now becoming an idea with some substance. People now respect strong and formative supervision.

Q: Mississippi is supposed to institute merit pay in two years, and the public strongly supports the plan. How would you advise Mississippi legislators?

A: First get all salaries up to a respectable level. Then get the evaluation process in place. In five years, look again to see if you have a real need for merit pay. When the public learns that merit pay won't get the incompetents out of the classroom, they probably won't support it. If you must implement a merit pay system, take the time to do it right, especially the appraisal system. Take time to work with teachers before the plan is finalized.

Q: Is merit pay cost-effective? Is discouraging bad teachers making career ladders effective?

A: States can use money in many ways. It isn't clear at what level more money makes a difference. Raising community interest in education and improving the public perception of the schools has come from career ladder plans. If the public is wrong and career ladders don't relate to better instruction, the public isn't aware of its mistake. I think incentive programs are cost effective if we can eliminate people before they fail in the classroom. In Texas we have begun to test college students before they enter education colleges and before they exit from them. This is being challenged in the courts, however, and the case is not yet decided.

Q: Wouldn't each state save money by training principals to be good leaders and evaluators?. In Mississippi we will have training and testing of building principals. What do we do if principals flunk the training? Doesn't that make us legally vulnerable?

A: Many principals were brought in to control discipline, not evaluate or be academic leaders. However, teachers have no constitutionally protected right to a wise evaluation. States can train principals to use evaluation instruments and States can help schools offer remediation programs. But not having perfect evaluators won't make a school district more vulnerable to a lawsuit.

Nationally, there is no uniform law on evaluation. State law controls what happens.

Q: Teaching research is beginning to affect educational practice. Evaluation may become less nebulous. If we make lots of laws and let the political arena take control, it can divert us from these useful results of research. Don't we need to stop and try to assess what we know before we go further?

A: What evidence is there that we should stop and let things be for a while? I don't know that there is any good evidence. I think states should set guidance but not pass long laws that detail procedures and processes. Public education reform has to be played out in the political arena, there is no way to avoid it. Regarding education research, the education community needs to agree on research implications before they will be accepted. What practitioners have found is that different approaches (suggested by research) work with different groups.

Q: Would it be possible for a teacher who gets a poor rating to pass it off (through a lawsuit) on poor training and supervision?

A: From a legal point of view, the answer is "no."

Q: When teachers get to Level 3 and Level 4 won't parents want their children to have all Level 4 teachers? Won't there be appeals and lawsuits by parents who demand "the best?"

A: Yes, this is possible. There is no current suit. This scenario could also drive more people to private education.

A NATIONAL PERSPECTIVE: LIABILITY AND RISK FOR LEAs

G. Ross Smith
Attorney
Little Rock, Arkansas

The general orientation of previous sections of this program has been toward preventive law practices as they relate to merit pay and career ladder considerations. I will attempt to provide some perspective on the liability aspect of career ladder and merit pay decisions. This is somewhat difficult since the legal issues involved vary from state to state, so let me give some general considerations regarding the legal liability of school districts as entities as well as the liability of individual members of Boards of Education and administrators. There are several sources of such potential liability: (1) state laws; (2) administrative regulations (such as those from a state education department); (3) school district policies and (4) the Constitution and laws of the United States.

Liability Under the Constitution and Laws of the United States

It is now clear that the school district as an entity can be liable in a merit pay situation. Prior law (Monroe vs. Pape, 1961) generally held that a school board was not a "person" under applicable civil rights statutes and hence could not be held responsible for damages. Thus, plaintiffs had to resort to suing individual members of a board of education or individual administrators whose decisions occasioned their grievance. However, in 1978, in the Monell decision, the Supreme Court reversed its prior holdings and held that a governmental entity such as a school district is in fact a "person" and can be held responsible for damages in a civil rights case. The test of liability required a determination whether the plaintiff could demonstrate that he or she was injured by an unlawful act under "official policy." The Court indicated that "official policy"

could include written policies of the school district itself as well as ordinances, regulation or customs and practices. Later, in Owen vs. City of Independence, it was held that even when members of a school board act in good faith, if its acts are subsequently held to be unconsitutional, the governing entity is liable. Accordingly, it behooves members of boards of education and administrators to have a reasonably good understanding of the Constitution and laws of the United States.

In a recent case unrelated to the educational context (City of Oklahoma vs. Tuttle (1951)), the Supreme Court limited the scope of an entity's liability by holding that the plaintiff's injury must in fact be shown to have been the result of an official policy or practice and that if the injury was the result of an isolated decision of an administrator, then liability of the entity would not follow.

With regard to the liability of individual officers, agents and employees of school districts, the landmark case was Wood vs. Strickland (1975). There, the Court indicated that the Plaintiff students had to demonstrate that their suspension from school by the local board of education was motivated by malicious intent on the part of the board. Previously, the Court of Appeals had indicated that malice need not be shown by proving the actual subjective motivation, but that the Plaintiffs could prevail if they could demonstrate a breach of "objective" good faith. In other words, if the board members could be shown to have acted imprudently and unreasonably, then malice could be presumed. However, the Supreme Court of the United States reversed that decision and held that school board members could be liable only if they (1) actually did act with subjective malicious intent or (2) if their actions violated clearly established constitutional rights of the Plaintiff. Thus, the Supreme Court endorsed a test of

liability involving both objective and subjective considerations. The Wood vs. Strickland test has, in the 1982 case of Harlow vs. Fitzgerald, been substantially modified. The test enunciated in that case seems to eliminate the subjective part of the liability test (i.e., did the board member actually act out of a malicious intent) and instead states the test of liability in the objective context. It thus appears that it is no longer necessary for the Plaintiff to attempt to prove the actual motivation which prompted his or her alleged injury, but rather simply to prove that the act which occasioned the injury was a violation of clearly established constitutional rights.

Areas of Concern in Merit pay and Career Ladder Proposals

There are a variety of issues which might arise in the context of merit pay and career ladder proposals which could expose individuals or school districts to liability. Some such issues are as follows:

1. The basis for differential treatment of teachers must be clearly stated and supported by a rational basis. Criteria incorporated into an evaluation system must meet the same standards.
2. The criteria for selection of persons or groups who will receive different treatment cannot be aribitrary, capricious or lacking in a rational basis.
3. In the event that the subjective evaluation criteria are used, courts will most likely view such criteria skeptically. The problem with subjective criteria, in most courts' view, is that they may allow bias to creep into the decision-making process.
4. In many situations, individuals who are to be adversely affected by a decision should not be afforded an opportunity to be heard prior to such decision and in some cases, be afforded an

opportunity to remediate the problems which are prompting the decision makers to propose adverse action.

5. Tests which might be utilized during merit pay and career ladder proposals should be free from cultural and other biases and should be validated to demonstrate that they actually measure what they purport to measure.
6. Other possible areas of concern would include the concept of seniority systems as they may relate to merit pay or career ladders, due process procedures for demotions, the possibility that decisions made are reprisals against particular employees because of their exercise of free speech or their race, sex or religion.
7. Finally, the merit pay or career ladder systems must be compatible with existing state law. Of particular interest in this context will be the laws of particular states as they relate to bargaining rights of teachers, the extent to which a board of education may delegate the authority to make personnel decisions, teacher dismissal procedures and reduction in force legislation.

APPENDIX

PREVENTIVE LAW INSTITUTE
CAREER LADDER/MERIT PAY

AUGUST 7, 1985

7:45 a.m. *** Coffee, Rolls, and Conversation ***

8:00 a.m. OPENING

PRESIDING - *Dr. Martha L. Smith*
Director
Division of Educational Information Services

WELCOME - *Dr. Preston C. Kronkosky*
Executive Director
Southwest Educational Development Laboratory

INTRODUCTIONS/PURPOSE - *Mr. Roger A. Labodda*
Policy Specialist
Regional Planning and Service Project

8:30 a.m. NATIONAL OVERVIEW OF CAREER LADDER/MERIT PAY

Dr. Virginia Koehler
Visiting Associate Professor
Department of Learning and Instruction
College of Education - University of Arizona

Introduction: Mr. Roger A. Labodda

9:00 a.m. LEGISLATIVE REVIEW PANEL

Rep. Jodie Mahony (Arkansas)
Rep. Allen Bradley (Louisiana)
Rep. Leslie D. King (Mississippi)
Rep. Maurice Hobson (New Mexico)
Mr. Bill Thoms, Senate Researcher (Oklahoma)
Rep. Bill Haley (Texas)

Moderator: Dr. Preston C. Kronkosky

10:30 a.m. BREAK

10:45 a.m. TEACHER'S PERSPECTIVE ON CAREER LADDER/MERIT PAY

Ms Karen Johnson
General Counsel
Director of Teacher Rights
Texas State Teachers Association

Introduction: Ms Judy Leach
Oklahoma State Department of Education

11:30 a.m. ADMINISTRATOR'S VIEW ON CAREER LADDER/MERIT PAY

Mr. Joe Hairston
Chairman, School Law Section of the
Texas State Bar Association

Introduction: Dr. Morris L. Holmes, Jr.
Arkansas State Department of Education

12:15 p.m. LUNCHEON BUFFET

WHAT IS PREVENTIVE LAW?

Mr. William C. Bednar, Jr.
Attorney
Eskew, Muir & Bednar

Introduction: Dr. Verlene Cabaniss
Texas State Department of Education

1:30 p.m. LOCAL EDUCATION AGENCY PERSPECTIVES

Mr. Kelly Frels
Attorney
Bracewell & Patterson

Introduction: Dr. Jack Gunn
Mississippi State Department of Education

2:30 p.m. BREAK

2:45 p.m. PRESENTERS' ROUNDTABLE

Ms Karen Johnson
Mr. Joe Hairston
Mr. William Bednar
Mr. Kelly Frels

Moderator: Dr. Patricia Duttweiler
Southwest Educational Development Laboratory

3:45 p.m. NATIONAL PERSPECTIVE-LIABILITY & RISK FOR LEAs

Mr. Ross Smith
Attorney
Little Rock, Arkansas

Introduction: Mr. Tommy Venters
Arkansas State Department of Education

4:30 p.m. CLOSING REMARKS

Dr. Martha L. Smith

*** PRESENTERS ***

Virginia Richardson Koehler

Dr. Koehler is currently a visiting professor in the Department of Learning and Instruction at the University of Arizona. She was, from 1977 to 1984, Assistant Director of the Teaching and Learning program at the National Institute of Education. Among her many experiences, Dr. Koehler has been a teacher, a Peace Corps volunteer and trainer, and a research specialist with the Office of Economic Opportunity. She received a B.A. in Mathematics from Utica College of Syracuse University; an M.A. in English Literature from the University of Chicago; and a Ph.D. in Comparative Education from Syracuse University.

Karen Lee Johnson

Ms. Johnson is General Counsel and Director of Teacher Rights for the Texas State Teachers Association. She received a B.S. degree from Texas Tech University and a J. D. from the Texas Tech School of Law. From 1976 to 1978, she served as Assistant General Counsel for the Texas Education Agency and prior to that was University Legal Council for West Texas State University at Canyon, Texas. She is member of the National Association of Teacher Attorneys.

Joe E. Hairston

Mr. Hairston is a partner in the law firm of Doyal, Hairston & Walsh. In addition to serving with the Texas Association of School Boards, Mr. Hairston has also been an Assistant Professor of English at Midwestern State University and an officer in the United States Navy. He received a B.A. in History from Harvard College, an M.A. in English from The University of Texas, a Ph.D. in American Studies from the University of Minnesota, and a J.D. from the University of Texas Law School. He is a member of the National Organization on Legal Problems in Education, Chairman of the School Law Section of the State Bar of Texas, and the Texas Association of School Boards (TASB) Council of School Attorneys.

William C. Bednar, Jr.

Mr. Bednar is a partner in Eskew, Muir & Bednar. He received a B.A. degree from Stanford University and a J.D. from the University of Texas School of Law. He was Chief of the Education and Civil Rights Section of the Office of the Attorney General of Texas, and General Counsel for the Texas Education Agency. Mr. Bednar was on the Board of Directors for the National Organization on Legal Problems in Education, 1982-1984 and Chairman of the School Law Section, State Bar of Texas, 1980-1981.

Kelly Frels

Mr. Frels is a partner in the law firm, Bracewell and Patterson. He joined the firm in 1970 as an associate, became a partner in 1976, and currently heads the firm's six-member school law section and is a member of the firm's management committee. Mr. Frels graduated from Southwest Texas State University and the University of Texas School of Law. He has served as president of the National Organization on Legal Problems of Education (NOLPE) and of the National School Boards Association's Council of School Attorneys.

G. Ross Smith

Mr. Smith, after fourteen years with the Little Rock, Arkansas law firm of Friday, Eldredge & Clark, opened his own law practice to specialize in the law of civil rights, school district litigation, and employment practices. He received his B.S. degree from the University of Arkansas and an L.L.B. from the University of Houston. Mr. Smith is a member of the National Council of School Attorneys. Mr. Smith was counsel for the Defendants in the Supreme Court cases of Hood v. Strickland and Board of Education v. McCluskey.

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